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I. Introduction

There is little doubt that the acceptance of China at the end of 2001 into the World Trade Organization constituted a great experiment, one with both substantial opportunities and significant risks for China and the existing WTO membership. China's desire to reestablish a role in global economic institutions has led the country to make significant modifications to laws and regulations and to significantly liberalize trade in many products – both before accession and since becoming a member of the WTO – consistent with many of its accepted obligations. This has led to increased market access opportunities for many countries' exporters including those from the United States. China's economic reforms have led to an extraordinary growth within China and the lifting of tens of millions of people out of poverty. Thus, some of the opportunities recognized as possible with WTO membership have materialized.

At the same time, the large role of the state in China and the industrial policies which have promoted rapid development and global dominance in many sectors through subsidies and other measures have continued unabated. Chinese policy objectives – including the rapid increase of the Chinese industrial base and manufacturing employment, control of the value of the currency at artificially low levels, the numerous areas where China continues not to accept obligations or has failed to honor the spirit of those commitments it has undertaken at the WTO, the slow road to rule of law at home, and a highly mercantilist approach to trade – have made relations with China difficult for many WTO members. Additionally, these Chinese policies have undermined the global system and have stymied a necessary rebalancing of the global system to support sustainable growth over time. At the recent Trade Policy Review of China in the WTO, both the U.S. and EU expressed strong concerns about backtracking by China on liberalization – concerns that have been expressed increasingly loudly by the business communities of both major trading powers in recent years.

A significant number of these concerns with China could be addressed through the WTO, including through dispute settlement if necessary. Other problems can also be addressed through effective enforcement of U.S. trade remedy laws, consistent with our WTO rights and obligations. However, the U.S. business community having made investments in China is unwilling in most instances to actually pursue their rights through U.S. government action, in part because of deep concerns about retaliation by the Chinese government (central, provincial

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[1] This submission is adapted from the Prepared Statement presented by Terence P. Stewart to the U.S.-China Economic and Security Review Commission at its June 9, 2010 hearing, "*Evaluating China's Past and Future Role in the World Trade Organization; Recommendations for Future U.S.-China Relations within the WTO*." The full statement is available on-line at http://www.uscc.gov/hearings/2010hearings/written_testimonies/10_06_09_wrt/10_06_09_stewart_statement.pdf .

and local). Anecdotal information suggests that China has flouted obligations undertaken, pressured companies to invest in China or lose access to the market, and applied many laws and regulations in an uneven manner favoring local companies, amongst other problems. While companies will raise such issues privately, few are willing to come forward and supply the information needed to have corrective action pursued. Thus, the risks identified with Chinese accession to the WTO a decade ago have complicated the ability of the U.S. and other trading partners to achieve the benefits negotiated in that deal.

The U.S., of course, has many other venues to address issues with China – such as the Joint Commission on Commerce and Trade and the Strategic and Economic Dialogue – and those venues are pursued by various parts of each U.S. administration. However, there is little question that on the issue of trade flows, tariffs, and non-tariff barriers, the WTO is the framework for understanding rights and obligations and remains an important venue for seeking compliance and for seeking greater liberalization. It is in this forum that countries like the U.S. struggle both to get greater compliance by China with obligations undertaken and to get China to accept a leadership role in liberalization.

Unfortunately, as China's power has risen, it has deviated from its path of reform to a more trade-restrictive regime. Consider the comments of U.S. Ambassador Punke on May 31, 2010:

> In the first years after China's accession to the WTO, China made noteworthy progress in adopting economic reforms that facilitated its transition toward a market economy and increased the openness of its economy to trade and investment. However, beginning in 2006, progress toward further market liberalization began to slow.
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> By the time of China's Trade Policy Review in 2008, the United States noted evidence of a possible trend toward a more restrictive trade regime, citing several Chinese measures signaling new restrictions on market access and foreign investment in China. At the root of many of these problems was China's continued pursuit of problematic industrial policies that relied on excessive government intervention in the market through an array of trade-distorting measures designed to promote and protect domestic industries ….
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> In the United States' view, China has become much more focused on developing industrial policy initiatives aimed at helping Chinese enterprises move up the value chain in key industries, and China has demonstrated a highly selective interest in continuing to open its market more fully and fairly to foreign participation.[2]

So the future relations for the U.S. and China within the WTO will ultimately depend on whether China accepts a responsibility for rebalancing the trade environment towards greater internal

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[2] *See* Trade Policy Review of China, *Statement by Ambassador Michael Punke, U.S. Permanent Representative to the WTO,* Geneva, May 31, 2010.

growth at home, whether China picks up the mantle of WTO leadership its growing share of global trade necessitates, and whether there is a return to a more market-oriented Chinese trade and investment policy (requiring progress on a whole host of trade distorting practices, from currency to industrial policies, etc.). The U.S. will certainly continue working with China to address specific issues either cooperatively or legalistically through the dispute settlement system of the WTO. While one can envision additional cases against China and such cases are important to help push a reluctant trading partner to conform its laws and practices to obligations undertaken, cases alone cannot correct the fundamental problems or create a framework for further global liberalization. Such corrections can only come if China accepts a set of principles currently far removed from China's model of economic growth. Alternatively, the U.S. and other trading partners need to reevaluate the trading system in light of the world's leading exporter's practices and determine collective approaches to these problematic Chinese issues. Neither scenario seems likely over the next decade, suggesting a significant expansion of trade friction between China and the United States.

II. Potential WTO Challenges to China's Trade and Industrial Policies

For any administration, the key to engagement with a trading partner is how to best move the trading partner into compliance with obligations. What approach is best will often depend on the receptiveness of the trading partner to addressing the concern, technical support issues, internal political problems, and other considerations. For U.S. businesses and their workers, what is needed is speedy resolution. WTO disputes are, for many issues, the last resort, not the first. U.S. companies are hoping that this government outreach to China will resolve the matter without a need for a formal bilateral or multilateral challenge, although a challenge may ultimately be needed. All of that said, a challenge to China's indigenous innovation policies and many other WTO complaints could be brought and hopefully will be (if other solutions are not achieved) soon. This following list is not intended to be exhaustive but simply some examples of problems being faced by many sectors of the economy desirous of doing business in China.

A. Indigenous Innovation

China's indigenous innovation policies is a clear example of China's attempts to promote industrial policies that favor Chinese industries while at the same time limiting market access for foreign-origin goods and service providers.

In December 2007, China issued a measure aimed at limiting government procurement of "indigenous innovative" products to "Chinese" products manufactured within China. Subsequently, in November 2009, China issued a circular identifying the eligible products and the criteria for being accredited as a national indigenous innovation product. Such accreditation would give preferential treatment in government procurement to that product. The eligible product areas are: computer and application devices; communication products; modernized office equipment; software; "new energy and equipment"; and energy-efficient products. Several provisions of the circular were problematic. The circular provided that to qualify as an indigenous innovation product, the product's intellectual property must have been registered originally in China. The same "first registration in China" requirement also applied to the

product's trademarks and brands. In addition, the circular required that a product must have highly advanced technology that equals or exceeds international standards.

The United States has expressed serious concerns to China about this measure, as it appeared, among other things, to be discriminatory, limit market access for foreign companies, and interfere with the exercise of intellectual property rights. At the recent 2010 Trade Policy Review of China, the U.S. stated:

> At present, the industrial policies generating the most controversy are China's so-called "indigenous innovation" policies. Over time, it has become evident that many of these programs contain elements that could discriminate against foreign products, foreign investors, foreign technology and/or foreign intellectual property. Recent measures have generated intense concern among WTO Members and their business communities by more concretely demonstrating a policy direction that seems designed to limit market access for imports and foreign investors and pressure enterprises to localize research and development in China, as well as transfer technologies.[3]

In April 2010, China revised its accreditation circular to address some of the concerns raised by the U.S. and others. In the revised circular, China relaxed the IP, trademark and brands "first registration in China" requirement, and changed the highly advanced technology requirement to require that a product be proven effective in conserving energy, reducing pollution, and/or raising energy-efficiency, or that it "substantially" improve on an original product's structure, quality, material, craftsmanship, or performance.[4] These changes, however, have not alleviated the concerns about this measure.

At the most recent Strategic and Economic Dialogue (S&ED) held in Beijing in May 2010, the fact sheet released by the U.S. government seemed to indicate that progress had been made on this issue.[5] Despite this statement, China's indigenous innovation policy is likely to be a continuing issue of dispute into the future. Indeed, following the S&ED, Under Secretary of Commerce for International Trade Francisco Sanchez stated that "China did not agree to a U.S. request to suspend its indigenous innovation policy" made at the S&ED, although China "did agree to provide additional time for U.S. industry and government comments on how it could achieve its goal of promoting innovation in China without discriminating against foreign companies."[6]

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[3] *See* Trade Policy Review of China, *Statement by Ambassador Michael Punke, U.S. Permanent Representative to the WTO*, Geneva, May 31, 2010, at 3.

[4] *See* US-China Business Council, *China Proposes Partial Solution to Indigenous Innovation Issues* (April 12, 2010); http://www.uschina.org/public/documents/2010/04/indigenous-innovation-memo.html.

[5] *See* Dept. of Treasury, *Second Meeting of the U.S.-China Strategic & Economic Dialogue, U.S. Fact Sheet – Economic Track*; http://www.ustreas.gov/initiatives/us-china/S&ED-2010-Fact%20Sheet.pdf.

[6] See Inside U.S. Trade, World Trade Online, Sanchez Says China Rebuffed U.S. Request for Indigenous Innovation Delay, June 4, 2010.

If concerns about these indigenous innovation policies are not adequately addressed by China, the U.S. should explore options for challenging these policies at the WTO. Given that China has still not acceded to the WTO Agreement on Government Procurement despite a commitment to do so in its Protocol of Accession, the U.S. may also wish to explore new means for increasing China's incentive to undertake those procurement obligations and comply with them. For example, Senators Stabenow, Graham, Feingold, Brown, and Casey have recently introduced bipartisan legislation that would withhold U.S. federal procurement dollars from China to increase U.S. leverage in this area.[7]

B. Export Restraints

One obvious example of the flouting of China's Protocol obligations is China's policies on export taxes. The Protocol of Accession limits products to which China can impose an export tax to 84 Harmonized System (HS) items and identifies the maximum export tax. China's 2010 list of products subject to export taxes lists 329 HS categories, nearly four times the number permitted under its protocol. Moreover, some of the products listed, although part of the 84 permitted in the protocol, are at rates above the maximum rate authorized. These are input materials by and large.

Efforts by China to reduce exports by quotas, export duties, export licensing, minimum export price requirements and other restrictions on some or all of these products are viewed by foreign competitors as creating twin artificial disadvantages for them. First, export taxes or other restrictions increase the cost of the materials to importing countries. Second, these restrictions reduce the cost of these materials to companies within China. This gives Chinese users of these inputs an artificial competitive advantage. It is worth noting in this context that the WTO Secretariat, in the 2010 Trade Policy Review of China, criticized China's use of export restraints in general and refuted China's stated rationales for using them.[8]

The U.S., the EU and Mexico have challenged a handful of these export restraints at the WTO, and those cases are currently in the early stages of panel activity.[9] The case raises a number of important issues for the multilateral trading system moving forward. Beggar-thy-neighbor policies in the area of raw materials, if not checked, could have potentially devastating consequences for global commerce, as a race to lock up and restrict resources would be the obvious likely outcome. Actions by China appear to be highly mercantilist in intent and are clearly distortive of global trade flows. If China's actions are, as seems likely, part of a conscious policy to give domestic producers artificial competitive advantages, then we will not likely see a rapid resolution of the dispute.

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7 *See* China Fair Trade Act of 2010, S. 3505.

8 *See* Trade Policy Review of China, *Report of the Secretariat*, WT/TPR/S/230 (26 April 2010) at 44.

9 *See* Note by the Secretariat re Constitution of the Panel Established at the Requests of the United States, the European Communities, and Mexico, *China — Raw Materials Exports*, WT/DS394/8, WT/DS395/8, WT/DS398/7 (March 30, 2010).

As China's export restraint policies are at the heart of many of the industrial policies that aim to force investment to shift to China or to otherwise distort trade flows to the advantage of domestic producers, the U.S. should bring a broad-based case against all of the export duty and other export restraints imposed that are not covered in the first case. Alternatively, one could do cases on other subsets of products affected. For example, export restraints on rare earth minerals would be a prime target for a WTO case. Rare earth minerals are important and essential raw materials used in critical applications ranging from defense systems (*e.g.*, precision-guided munitions), to hybrid electric motors and batteries, cell phones, computer hard drives, energy efficient light bulbs, wind-power turbines, and fiber optics, amongst others. In the past, the United States had a fully integrated industry to mine rare earth minerals and convert them to oxides, metals, alloys, semifinished products and finished components, and supplied close to 100% of rare earth minerals to global markets. That is no longer the case. Currently, China supplies more than 90% of the globe's rare earth minerals and downstream processed products.

C. Trade-Related Investment Measures

As part of its accession, China committed that it would comply with the TRIMs Agreement and eliminate, and cease to enforce, export performance requirements, including in contracts imposing such requirements.[10] However, despite clear obligations by China to eliminate export requirements as part of investment or licensing systems for producers, the International Trade Commission's public report in the Section 421 Passenger Tires from China investigation showed that China has not eliminated, but continues to allow, mandatory export requirements for companies investing in China. These requirements put pressure on trading partners as investment in China is not allowed to service the domestic market but must, for an extended period of time, be used to flood export channels. In that 421 case, one company in particular, Cooper Tire & Rubber, revealed that it was required to export all tires produced by its recent joint venture facility in China for five years:

> Cooper Tire & Rubber, which is both a domestic producer of subject tires and an importer of subject tires from China, takes no position regarding petitioner's remedy. Cooper recommends, however, that any quota be managed by the U.S. government, such as through a licensing or visa system. Cooper explains that it is concerned about how a quota would be administered procedurally because its business license for its Kushan plant in China requires Cooper to export all the tires produced in the plant during the first five years; production at the plant began in February 2008. Final comments of Cooper Tire & Rubber at 2-3.[11]

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[10] *See* Protocol on the Accession of the People's Republic of China, WT/L/432 (23 November 2001) at Part I, item 7, para. 3; Report of the Working Party on the Accession of China, WT/MIN(01)/3 (10 November 2001) at section IV.D.5, para. 203.

[11] *Certain Passenger Vehicle and Light Truck Tires from China*, Investigation No. TA-421-7, USITC Publ. 4085 at 34 n. 190 (July 2009).

> The Company has entered into a joint venture with Kenda Tire Company to construct and operate a tire manufacturing facility in China which was completed and began production in 2007. Until May 2012, all of the tires produced by this joint venture are required to be exported and sold by Cooper Tire & Rubber Company and its affiliates.[12]

This is a concrete example of a violation of China's obligations under the TRIMs Agreement and its accession commitments (protocol and working party report) to eliminate export performance requirements tied to investment. While many companies who accept these obligations are hesitant to acknowledge the WTO-inconsistent obligation accepted, the U.S. should pursue aggressively any instances where public information confirms the existence of such WTO-inconsistent obligations.

In the most recent Transitional Review Mechanism (TRM), China maintained that it had faithfully honored its commitments "in respect of the TRIMs Agreement as found in paragraph 7.3 of the Accession Protocol of China, more specifically those commitments on such performance requirements as local content, offsets, the transfer of technology, export performance or the conduct of research and development, etc."[13] Interestingly, however, China "clarified that while China's commitment was that the approval for the right of importation or investment was not conditioned on performance requirements including the transfer of technology, it nevertheless would not stop the parties to a joint venture contract from negotiating provisions on technology transfers according to their own wish."[14]

The United States did bring two WTO cases against China which involved, in part, export performance requirements. In the first case, the U.S. claimed that certain measures granting refunds, reductions, or exemptions from taxes or other payments otherwise due to the Chinese government by enterprises in China appeared to be provided on the condition that those enterprises purchase domestic over imported goods, or on the condition that those enterprises meet certain export performance criteria, a violation *inter alia* of Article 2 of the TRIMs Agreement.[15] In this case, the U.S. and China reached a settlement in the form of a Memorandum of Understanding, with China agreeing to repeal the measures at issue.[16]

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[12] Cooper Tire & Rubber Company, 2008 10 K at 40.

[13] *See* Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of Accession of the People's Republic of China to the World Trade Organization, *Report of the Chairman*, G/L/899 (23 October 2009) at Annex 1, para. 16.

[14] *See* Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of Accession of the People's Republic of China to the World Trade Organization, *Report of the Chairman*, G/L/899 (23 October 2009) at Annex 1, para. 18.

[15] *See* China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, *Request for Consultations by the United States*, WT/DS358/1, G/L/813, G/SCM/D74/1, G/TRIMS/D/25 (7 February 2007).

[16] *See* China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, *Communication from China and the United States*, WT/DS358/14 (4 January 2008).

In the second case, involving subsidies provided to China's "famous brand" products, the U.S. claimed that certain measures offering grants, loans, and other incentives to enterprises in China appeared to be provided on the condition that those enterprises meet certain export performance criteria.[17] As such, the U.S. claimed that the challenged measures qualified as prohibited export subsidies. As in the first case, the U.S. and China reached a settlement in this dispute, with China agreeing "either to eliminate the measures of concern or to modify them to remove any provisions related to export-contingent brand designations and financial benefits."[18]

D. Other Issues

There are a host of other trade and industrial policies maintained by China that should be examined for potential WTO challenge. For example, recent USTR reports on sanitary and phytosanitary measures and technical barriers to trade being encountered by U.S. companies in China (and in other countries) provide a roadmap of practices that could be reviewed for consistency with WTO obligations and pursued where appropriate.[19] In addition, the U.S. – China Commission held a hearing in May of this year on the civil and military aircraft industry in China that revealed technology transfer agreements and support programs in the sector that may be challengeable within the WTO. Finally, a study on technology transfer, trade-related investment measures, subsidies, and intellectual property rights protections in China that our firm prepared in 2007 identified a number of areas where additional WTO challenges could be brought, many of which continue to pose obstacles to U.S. firms and workers today.[20]

III. Addressing the Undervaluation of China's Currency

Economists are in broad agreement that China's currency is substantially undervalued, by as much as 40% according to some estimates. While China's recent decision to begin to liberalize its exchange rate is a welcome step in the right direction, it falls short of allowing the exchange rate to be fully market determined and is therefore insufficient to eliminate the full extent of undervaluation that continues to occur. China's currency undervaluation provides an unfair competitive advantage to its producers by artificially increasing the cost of U.S. exports and decreasing the cost of Chinese goods imported into the United States. The consequences of this

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17 *See* China –Grants, Loans and Other Incentives, *Request for Consultations by the United States*, WT/DS387/1, G/L/879, G/SCM/D81/1, G/AG/GEN/79 (7 January 2009).

18 *See* USTR press release, *United States Wins End to China's "Famous Brand" Subsidies After Challenge at* WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector, December 18, 2009.

19 *See* USTR, 2010 Report on Sanitary and Phytosanitary Measures at 32-37; USTR, 2010 Report on Technical Barriers to Trade at 69-75.

20 *See* Terence P. Stewart, et al., *China's Laws, Regulations and Practices in the Areas of Technology Transfer, Trade-Related Investment Measures, Subsidies and Intellectual Property Protection Which Raise WTO Compliance Concerns*, prepared for the U.S. China Economic and Security Review Commission (Sept. 2007), available on-line at http://www.uscc.gov/researchpapers/2008/TLAG%20Report%20-%20China's%20Laws,%20Regulations,%20Practices%20in%20Areas%20of%20Technology%20and%20WTO%20Non-Compliance.pdf .

undervaluation have been the massive and persistent U.S. trade deficit with China, elimination of important export opportunities, harsh competition for domestic producers from unfairly low-priced imports, and the loss of production, income, and employment in the United States. The U.S. should explore options for addressing this unfair competition through multilateral means at the WTO and through the enforcement of our trade remedy laws.

A. WTO Dispute Settlement Options

There are viable claims that the United States could make to challenge China's unfair currency practices through the WTO dispute settlement system. The United States need not wait for a formal determination from the International Monetary Fund that China is manipulating its currency before bringing a WTO case. If a WTO challenge were successful, the U.S. could ultimately be authorized to raise tariffs or take other retaliatory measures unless China brought its currency practices into compliance with WTO rules.

The potential bases for challenging China's exchange rate policy are that the undervaluation of China's currency: (1) constitutes a prohibited export subsidy within the meaning of various GATT articles and WTO Agreements; (2) violates GATT Article XV:4; (3) violates GATT Article II:3; (4) violates China's obligations under the International Monetary Fund's Articles of Agreement; and (5) nullifies and impairs benefits accruing to the United States.

The WTO and IMF are part of a coherent, rules-based system that was designed to prevent and redress exactly the type of trade-distorting currency practices that China is currently engaged in. Those rules can and should be employed to their fullest extent to achieve effective relief for American industries, farmers, workers, and communities.

B. Enforcement of U.S. Countervailing Duty Law

Since before the founding of the GATT in the late 1940s, U.S. countervailing duty law has permitted our government to offset the trade distorting effects of at least certain types of artificial currency advantages. Treasury so found in the 1930s and in the 1950s.[21] The GATT also reflected the right of countries to address these distortive currency problems either under the antidumping or countervailing duty provisions of Art. VI of the GATT. This is so even though there are GATT provisions (Art. XV) calling for cooperation with the IMF on certain currency questions. While it is true that the provisions involved in GATT Art. VI and in prior U.S. case law pertain to looking for dual currency situations, a currency that is undervalued by reason of government action presents the same problems as a dual currency – a currency provides artificial advantages to exporters where used to encourage exports – and has the added pernicious effect as practiced by China of discouraging imports. These practices should be subject to the same corrective action permitted for dual exchange rate policies.

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[21] *See, e.g.*, T.D. 48360 (June 1936) and T.D. 53257, 88 Treas. Dec. 105; 18 Fed. Reg. 2653 (May 7, 1953); *F.W. Woolworth Co. v. United States*, 115 F.2d 348 (CCPA 1940); *V. Mueller & Co. v. United States*, 115 F.2d 354, 360 (CCPA 1940); *Robert E. Miller & Co., Inc. v. United States*, 34 CCPA 101, 102-103, 105 (1946); *Energetic Worsted Corp. v. United States*, 224 F. Supp. 606, 612-614 (Cust. Ct. 1963), *rev'd on other grounds*, 53 CCPA 36, 45-46 (1968).

There is both past precedent and current authority in the Ad Note to Article VI of the GATT 1994 to use trade remedy laws (either antidumping or countervail) to address the injurious effects of various currency practices, including undervaluation. For example, In 1958, the GATT Secretariat studied the application of antidumping and countervailing duties by the Contracting Parties. In reviewing the types of measures that involve subsidization, the study referenced the Ad Note to Article VI:

> A special type of low price import may also be mentioned in this connextion, namely those which are the consequence of currency measures taken in the exporting country. While in most such instances the price comparison will not permit the levy of an anti-dumping duty, GATT expressly permits the levy of countervailing duties in circumstances where the exportation of the product is facilitated by a multiple currency system (Note to Article VI). A case in which such a provision has been applied is the imposition of a countervailing duty by the United States on imports of wool tops from Uruguay.[22]

The study further noted: "Concerning countervailing duties, the United States has indicated that these are used to offset all types of export subsidization, including subsidization through differential exchange rates."[23]

Thus, the United States should be able to use our unfair trade laws to deal with underpriced currencies from any country, including China. Such action should withstand WTO scrutiny if the system is functioning properly and interpreting agreements consistent with negotiators' intent.

IV. Conclusion

China's trade and industrial policies are putting U.S. firms, farmers, ranchers, and workers at a profound competitive disadvantage. Not all aspects of China's industrial policy involve issues that can be adequately addressed under WTO rules or through the enforcement of domestic trade remedy laws. Many problems are also difficult to address through these formal means by virtue of the fact that the victims of the problem are unable or unwilling to provide the factual information to the U.S. to permit them to bring formal proceedings, due to concerns about retaliation or other fallout effects. That said, the WTO dispute settlement system and our trade remedy laws provide important tools for supplementing the bilateral dialogue the U.S. currently uses to address trade problems presented by China's industrial policies. Those tools should be used to the fullest extent possible to realize the benefits that American firms and workers were promised upon China's accession to the WTO nearly nine years ago.

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[22] GATT, Anti-Dumping and Countervailing Duties (July 1958) at 11.

[23] *Id.* at 13.